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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of  
MARTHA J. HUBER, et al.

For Construction Permit for a  
New FM Station on Channel 234A  
in New Albany, Indiana

)  
) MM Docket No. 93-51  
)  
) File Nos. BPH-911114ME,  
) et al.  
)  
)

TO: Honorable Richard L. Sippel  
Administrative Law Judge

REPLY TO OPPOSITION TO  
PETITION TO ENLARGE ISSUES

Martha J. Huber (Huber), by her attorneys, now replies to the "Opposition to Petition to Enlarge Issues" filed by Rita Reyna Brent (Brent) on June 2, 1993.

In her May 17, 1993 "Petition to Enlarge Issues," Huber demonstrated that Brent's counsel had admitted that Brent did not have the financial documentation that applicants must have on hand when they certify to their financial qualifications. Brent's opposition directly contradicts an earlier pleading she filed and does not provide the alleged financial documentation that might have answered the serious questions about her financial certification. Many substantial and material questions of fact remain which can only be resolved by specifying appropriate issues and holding a hearing.

Huber had filed a motion to compel seeking the production of financing documents, which Huber interpreted to include, for applicants proposing to rely upon funds from individuals,

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balance sheets and/or financial statements. In response to Huber's motion, Brent's counsel wrote:

Brent has not failed to comply with §1,325. She does not have any financing documents which would be subject to production under subparagraph (c)(1)(v).

Although Brent is not holding any documents not previously produced, she believes that it would be appropriate to comment briefly on the legal underpinnings of Huber's Motion.

See Huber Petition, Attachment 4, P. 2. The plain meaning of that language is that Brent did not have any balance sheets, income statements or other documents that Huber was requesting.

Brent accuses Huber of making "an irrational misinterpretation" of the pleading (Brent Opposition, P. 1) and attempts to characterize the language as a meaningless "transition phase" (Brent Opposition, P. 3). Brent's attempt to explain away the statement cannot be accepted because it contradicts the plain language of her counsel's statement. When Brent (through counsel) wrote that she was "not holding any documents not previously produced," that statement was not limited to financing documents that Brent thought should be produced. It was a general statement relating to all documents requested by Huber, including balance sheets and income statements. If Brent's sole purpose was to make legal argument as to why such documents need not be produced, the whole first sentence of Paragraph 3 would have been unnecessary. The subsequent legal argument of counsel served

to deemphasize the fact that no documents existed as well as to protect Brent's position. The words must be given their plain English meaning.

Brent's declaration, in which she claims she had a balance sheet and income statements "on hand" when she prepared and signed her application, only raises further questions which must be resolved in a hearing. That declaration cannot be reconciled with the plain language of counsel's representation. A hearing must be held to resolve this discrepancy. Moreover, Brent's statement cannot be accepted at face value because she did not attach the documents that she allegedly had on hand when she certified. In Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953, 64 RR 2d 1748, 1755 (Rev. Bd. 1988), the Board cited 2 Wigmore on Evidence §285 (1940) for the classic principle that:

The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.

For the purpose of determining whether issue enlargement is appropriate, adverse inferences should be drawn from Brent's failure to produce the documents in question. Indeed, if Brent and her husband did in fact have a balance sheet reflecting \$180,000 in net liquid assets (i.e., liquid assets less current liabilities), a not insubstantial sum, we can be assured that Brent would have submitted the balance sheet.

Brent's failure to present any such document clearly warrants an adverse inference.

The type of factual questions involved here is very similar to the factual questions that required the Presiding Judge to specify a financial qualifications issue against Staton Communications, Inc. (Staton). Memorandum Opinion and Order, FCC 93M-318 (released June 2, 1993). With respect to Staton, the "plain language" of its bank letter made the letter contingent upon the nonvoting stockholder's

participation in management of the station. 72 at 16. The

when faced with ambiguities is to specify an issue "rather than face a remand." Memorandum Opinion and Order, FCC 93M-314 (released June 1, 1993) at ¶8. The questions concerning Brent's compliance with the Commission's financial qualifications standards are even more serious than the questions concerning Midamerica, Staton and Huber that resulted in the specification of issues against those applicants. The Court of Appeals' decision in Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 71 RR 2d 1386 (D.C. Cir. 1993) emphasizes the danger of a remand when lingering questions about an applicant's financial qualifications are ignored.

Brent correctly notes that Astroline Communications Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1561-1562, 65 RR 2d 538, 541-542 (D.C. Cir. 1988) "articulates the standard for designating a hearing issue." Brent Opposition, P. 3. Under that standard, issues must be designated against Brent. The first step in the analysis is to assume that the specific facts in the petition are true and determine if a reasonable fact finder could conclude "that the ultimate fact in dispute had been established." Here, the statement in Brent's pleading establishes more than a reasonable possibility that

1. The first part of the document is a title page. It contains the title "THE HISTORY OF THE UNITED STATES OF AMERICA" and the author's name "BY JAMES M. SMITH".

Accordingly, Huber asks the Presiding Judge to grant her  
"Petition to Enlarge Issues."

Respectfully submitted,

MARTHA J. HUBER

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Date: June 11, 1993

CERTIFICATE OF SERVICE

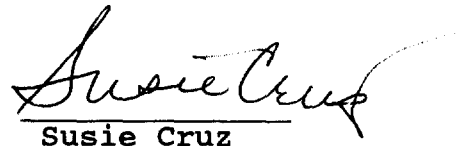
I, Susie Cruz, do hereby certify that on the 11th day of June 1993, a copy of the foregoing "Reply Opposition to Petition to Enlarge Issues" was sent first-class mail, postage prepaid to the following:

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